## SUBJECT INDEX.


| | PAGE |
|---|---|
| Supplemental Statement | 1 |
| Summary of Argument | 3 |
| Argument | 5 |


---

## CITATIONS AND AUTHORITIES


| | |
|---|---|
| Commercial Credit Co. v. United States, 276 U. S. 226 | 18 |
| Congressional Record, 66th Congress, 1st Sess., Vol. 58, No. 3, pp. 2891, et seq. | 26 |
| Corpus Juris: | |
| Vol. 4, p. 1132, Sec. 3125 | 16 |
| Vol. 4, p. 1080, Sec. 3066 | 16 |
| Dwight v. Merritt, 140 U. S. 213 | 7 |
| Hahn v. United States, 107 U. S. 402 | 11 |
| Herter v. United States, 33 Fed. (2d) 400/402 | 22 |
| Hurley, In re, 37 Fed. (2d) 397 | 4, 12, 13 |
| Logan v. Davis, 233 U. S. 613, 627 | 11 |
| Prigg v. Pennsylvania, 16 Pet. 539 | 11 |
| Quantity of Distilled Spirits, Fed. Case No. 11494 | 7 |
| Rate Refrigeration Co. v. Saltzberger, 157 U. S. 1 | 8 |
| Revenue Act of 1918, Sec. 600-A | 19 |
| Revised Statutes, Sec. 3454 | 3 |
| Revised Statutes of 1918, Sec. 600-A | 18 |
| Richbourg Motor Co. v. United States, 281 U. S. 528 | 5, 18, 20 |
| Shell's Executors v. Tauche, 138 U. S. 562 | 11 |
| Texas & Pac. Ry. v. Interstate Com. Comm., 162 U. S. 197, 218 | 8 |
| The City of Panama v. Phelps, 101 U. S. 453 | 11 |

## AUTHORITIES—*Continued*


| | PAGE |
|---|---|
| 26 U. S. C. A. 245 | 18 |
| 26 U. S. C. A. 1181 | 19 |
| 26 U. S. C. A. 1185 | 6, 14 |
| 27 U. S. C. A. 34 | 5, 19, 24 |
| 27 U. S. C. A. 39 | 5, 19, 22 |
| 27 U. S. C. A. 40 | 19, 20 |
| United States v. Bowen, 100 U. S. 508 | 8 |
| United States v. One Ford Coupe, 272 U. S. 321 | 20 |
| United States v. One Ice Box, 37 Fed. (2d) 120 | 5, 13 |
| United States v. Pugh, 99 U. S. 265 | 11 |
| United States v. Quantity of Tobacco, Fed. Case No. 16106 | 7 |
| United States v. Sweet, 189 U. S. 471 | 11 |
| United States v. Ten Bottles of Scotch Whiskey, 48 Fed. (2d) 545 | 5, 8 |
| United States v. Union Pac. Ry. Co., 91 U. S. 72, 86 | 6 |
| Various Items, etc. v. United States, 282 U. S. 577 | 18 |

# In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,
*Petitioner,*

*vs.*

EDWARD RYAN, Claimant of One Brunswick Bar, etc.,
*Respondent.*

## BRIEF FOR THE RESPONDENT

### Supplemental Statement.

The search and seizure were made February 24th, 19[illegible] at 7 West Galena Street, Butte, Montana, under a search warrant. The liquor seized consisted of two quarts of moonshine whiskey, a gallon jug about half full of moonshine whiskey; two quarts, or bar bottles, fifths of gallons; one gallon jug of gin, and twenty-seven pint bottles of home brew beer. There were no internal revenue stamps on any of the bottles. "It wasn't a distillery or warehouse or place of business of rectifier or wholesale liquor distillery. It was a joint. Just the usual barroom." (R. 26-27.) The liquor was not guaged for the purpose of ascertaining what Internal Revenue taxes, if any, were due and not paid. All of

the liquor was destroyed by Prohibition Officer Holter immediately upon its seizure, after filling a half-pint bottle. "You didn't have any Internal Revenue taxes on your mind at that time, did you? No, it was whiskey I poured out. I poured it out because I found this man in possession selling intoxicating liquor over the bar. That certainly was what I arrested him for. That's what I made the seizure for." (R. 31.) The search warrant was issued upon affidavit and complaint for a violation of Title II of the National Prohibition Act. (R. 33-34.) It commanded search and seizure under the provisions of Title II of the National Prohibition Act and none other. It specified the things to be seized, but included none of the articles here claimed by the respondent. The return discloses the seizure, under the warrant, of these articles (R. 37-39).

George Lewis, the man in possession and who it is charged sold intoxicating liquors at said 7 West Galena Street, was arrested and subsequently indicted by the grand jury on four counts, namely; selling intoxicating liquor without a permit from the commissioner of internal revenue, possession of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act (2 counts), and unlawful maintenance of a common nuisance in violation of Title II of the National Prohibition Act. (R. 36.)

On May 23rd, 1930, Lewis was called for arraignment and plea but failed to appear. On motion of the district attorney, his default was entered, his bond forfeited, bench-warrant was issued and new bail fixed. (R. 37.)

The libel of information in the case at bar was filed

March 21st, 1930. (R. 3.) The marshal's return to the warrant of arrest and monition shows that he received the paper March 21, 1930, and executed it on the 24th day of March, 1930, "by attaching the following articles stored with the Jones Storage and Transfer Co., at Wyoming and Iron Streets, Butte, Montana, to-wit: (describing the articles herein involved) (R. 7) and the same property theretofore seized by prohibition officer Holter on February 24th., 1930, under the search-warrant above referred to. (R. 39.) Trial was had May 20th., 1930. (R. 24.) At its conclusion, upon respondent's motion for a directed verdict, the court's attention was specifically directed to the pending criminal action against Lewis under the indictment above referred to, whereupon the court observed: "I suppose you are working on the point of having possession under the Prohibition Act? Qualifying on a point of law?" Counsel: "A point of law."

No question was raised by assignment of error, or otherwise that Section 3453 R. S. (1185 U. S. C.) was impliedly repealed by the provisions of the National Prohibition Act. (R. 46-49.) The question was on the election of remedies.

## SUMMARY OF ARGUMENT

### I.

Section 3453 of the Revised Statutes (26 U. S. C. A. 1185) contains three sentences. In 1864 and as amended in 1866 the section consisted of a single sentence. Conflicting judicial constructions were placed upon it. When carried forward into the Revised Statutes it was punctuated as it now stands. It declares the law as of

December first, 1873, the effective date of the Revised Statutes. Under it only goods, wares, merchandise, articles, or objects on which taxes are imposed, and evaded, are subject to seizure and forfeiture, as declared in the first sentence. Tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure, are subject to seizure and forfeiture only when associated with a manufactory of some kind, as declared in the second sentence of the statute. (*In re Hurley*, 37 F. (2d) 397.)

Contemporaneous construction is controlling. For a half century (1879-1930) the Department of Internal Revenue did not avail itself of the provisions of the statute to seize other than articles *per se* contraband unless associated with a manufactory of some kind, so far as the reported cases disclose.

The language of the statute supports the construction given to it by the Circuit Court of Appeals. (R. 58-61.)

II.

In this case there was an election of remedies by the United States and the Government is bound thereby, though the Circuit Court found it unnecessary to base its decision upon this ground, urged in the trial court. (R. 47, Assignment of Error No. II.)

A prosecution was instituted under the National Prohibition Act. The property involved herein was seized by a Prohibition Enforcement Agent armed with a search-warrant issued under the provisions of the National Prohibition Act. (R. 33-35, 37-39.) The seizure was adopted and the property was in *custodia legis*, stored in a public ware-house, when it was again seized (?) by the United States Marshal under a war-

rant and monition issued in this libel proceeding. (R. 7.) The person in charge of the place where the property was first seized at 7 West Galena Street, Butte, Montana, was indicted by the grand jury for violation of the National Prohibition Act, the fourth count charging him with the maintenance of a common nuisance " * * * in violation of Title II of the National Prohibition Act." (R. 36-37.)

Under the facts the National Prohibition Act governs, (Section 22, 25, Title II, 27 U. S. C. A., 34, 39) as it does in transportation cases. (*Richbourg Motor Company v. United States,* 281 U. S. 528.)

Both propositions advanced by us are supported by numerous authorities cited in the following argument.

## ARGUMENT

### I.

The epitome of the revenue statute as set down by counsel for petitioner in opening the argument on page 8 of the brief for the United States serves to illuminate the contentions advanced favoring a construction of the law to harmonize with the conclusions reached by Judge Woodward in the Ice Box case (*U. S. v. One Ice Box,* 37 F. (2d) 120 (N. D. Ill.)), and by Judge Hand of the Circuit Court of Appeals for the Second Circuit in the recent case of *United States v. Ten Bottles of Scotch Whiskey,* 48 F. (2d) 545, wherein the learned Judge had occasion to observe, while commenting on the statute as it stood in 1864, and as it appeared after amendment in 1866: "The best escape, though it does much violence to the language, is to read the phrase as meaning, etc., "in referring to the second clause of the second sentence,

of the section. We submit the law should not rest upon a construction obviously grounded upon speculation as to the legislative intent. This Court once quoted an English jurist who said: 'I venture to lay it down as a general rule respecting the interpretation of deeds that all latitude of construction must submit to this restriction; namely, that the words may bear the sense which by construction is put upon them. If we step beyond this line we no longer construe men's deeds, but make deeds for them.' This rule is as applicable to a statute as a deed."

*United States v. Union Pac. R. R. Co.*, 91 U. S. 72-86.

The statute under consideration (*R. S.* 3453 (26 *U. S. C. A.* 1185)) is correctly quoted in the appendix to petitioner's brief at page 27. It will be observed the section is composed of three sentences. The first sentence deals with things contraband *per se*, and provides for their seizure and forfeiture. The second sentence is divided into two parts, separated by a semi-colon, and deals with two classes of things. The first relates to raw materials found in the possession of any person intending to manufacture the same "into articles" of a kind subject to tax for the purpose of fraudulently selling such "manufactured articles," or with design to evade the payment of such tax. The second part of the sentence is important, for under its language petitioner's position becomes tenable, if at all. It reads:

"* * * and all tools, implements, instruments and personal property whatsoever, in the place or building, or within any yard or inclosure where such

articles are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid."

The third sentence relates to proceedings "to enforce such forfeitures"; i.e., things seized under the provisions of both preceeding sentences.

Prior to being carried forward to become section 3453 of the Revised Statutes, the section stood as a single sentence (Appendix, petitioner's brief, pp. 25-26). It was during this period District Judge Blatchford decided the two cases relied upon by petitioner and cited in the brief, pp. 12-13, namely, *United States v. Quantity of Tobacco,* (1872) Fed. Cas. No. 16106, and *Quantity of Distilled Spirits,* (1868) Fed. Cas. No. 11494. All authorities agree that prior to the amendment of 1866, the portion of the section under consideration was ambiguous and meaningless. Apparently when Judge Blatchford undertook to construe the statute after its amendment, but before it was incorporated into the Revised Statutes, he was dealing with the component parts of a single sentence, and his conclusions are therefore not surprising. Be that as it may, the fact is that the compilors of the Revised Statutes saw fit to punctuate the section so as to set it off in three separate sentences, each with a distinct and separate subject matter, and it is with the section thus punctuated that we must now deal.

*Dwight v. Merritt,* 140 U. S. 213.

The Revised Statutes constitute the legislative declaration as of December 1st, 1873.

*Rate Refrigeration Co. v. Saltzberger,* 157 U. S. 1; *United States v. Bowen,* 100 U. S. 508.

"Even in construing the terms of a statute, courts must take notice of the history of the legislation and out of the different possible constructions, select and apply the one that best comports with the genius of our institutions and therefore most likely to have been the construction intended by the law making power."

*Texas & Pac. Ry. v. Interstate Commerce Commission,* 162 U. S. 197-218.

In this connection it is noteworthy to observe the cases relied upon by counsel for petitioner, bearing directly upon a construction of the statute (*R. S.* 3453), all admit the harshness of a construction leading to the forfeiture of innocent personal property merely because of its association with or proximity to contraband commodities, and seek to limit such seizures to the immediate vicinity, or within the same room, where they may be found. This in spite of the fact that the second clause of the second sentence of the section provides for seizure and forfeiture of "all tools, etc., in the place or building, or within any yard or inclosure where such articles or raw material are found, * * *." Thus, in the recent case of *United States v. Ten Bottles of Scotch Whiskey,* 48 Fed. (2d) 545, two libels of information were each held defective:

"In Collins' case the libel alleged that 'the premises 1286 Bedfore Avenue' were within the East-

ern District of New York; that Collins possessed the liquor 'at the said premises': and that the chattels seized were 'in or within the same place or building' as the liquors. In Powell's case the allegations are in substance the same, except that the chattels are alleged to be 'in or within the same place' as the liquors or raw materials. *We adhere to the views of Judge Choate* that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and we may add, in a part associated in use with that where the liquors are possessed. *The opposite view would result in fantastic injustice which is certainly outside the purpose of the law.* * * * 'Place' seems to have been used in the libels as the equivalent of the building at the street number mentioned, and it is consistent with the allegations that the chattels were anywhere in those buildings and that Collins or Powell were not in the occupation of the part where they were. Hence, to succeed the libels must be amended to declare that *the place where the chattels were seized was also in occupation of the possessor of the liquors, and not divorced in use from that where the liquor or raw materials themselves were possessed.*

"This will not necessarily be enough, we do not now decide whether in addition it must appear that the chattels were in custody of the possessor, and if so, that they were being used as ancillary to the unlawful purpose." (Italics supplied.)

The views of Judge Choate were expressed in 1879, and counsel for petitioner say the Judge held the statute to have the effect earlier given it by Judge Blatchford. (Petitioner's brief, p. 14.) Counsel quote Judge Blatchford as holding (1868): "not only are the spirits

forfeitable under this section, but also all tools, implements, and personal property whatsoever, in the place or building where the spirits were found," and again: "the spirits and everything in the establishment are forfeited." (Id., p. 13.) It thus appears that the precedents relied upon by Judge Choate do not coincide with the views to which he adhered. Indeed, it appears there was great divergence of opinion amongst the various courts in the early cases dealing with this statute. Further illustrations may be found in the opinion of Judge Rudkin in the case at bar (R. 59-60), wherein he declares, "* * * the decisions of the Circuit and District Courts, both early and late, are in hopeless conflict." It is noteworthy to observe that the early cases were all decided between 1868 and 1879:

> "* * * and for the next half century, so far as we are advised, there is no reported case on the subject under consideration. As said by the court In re Hurley (37 F. (2d) 397, 401), decided during the present year:
>
> "'Since 1879, so far as disclosed by reported cases, the Department of Internal Revenue of the United States has not availed itself of this statute to seize personal property other than contraband goods, except in the case of a distillery or manufactory of some kind.'" (R. 60.)

This fact influenced the court in deciding the case as it did.

> "A reference to the decided cases clearly demonstrates that the question with which we are now confronted is by no means free from doubt or difficulty, but in view of the apparent attitude of the

> department charged with the administration of the revenue laws during the past fifty years, and in view of the inequality, if not injustice, that would necessarily result from a strict enforcement of the forfeiture provisions of the statute, as construed by the court below, we feel constrained to hold that the provisions should be limited or restricted to places where the contraband articles are manufactured as in C. I. T. Corporation v. United States decided by this court November 10, 1930." (44 F. (2d) 950.) (R. 60-61.)

The decision is grounded upon sound precedent. The contemporaneous construction of a law by those called upon to act under it is entitled to great respect, especially when long acquiesced in, and practical action thereunder will be followed by the courts in the construction of statutes which are ambiguous or doubtful.

*Prigg v. Pennsylvania*, 16 Pet. 539;
*The City of Panama v. Phelps*, 101 U. S. 453;
*United States v. Pugh*, 99 U. S. 265;
*Hahn v. United States*, 107 U. S. 402;
*U. S. v. Sweet*, 189 U. S. 471;

*Logan v. Davis*, 233 U. S. 613, and cases cited on page 627, in support of the declaration:

> "The practical interpretation of an ambiguous statute is entitled to highest respect and if acted upon for a number of years will not be disturbed except for very cogent reasons."

In *Shell's Executors v. Tauche*, 138 U. S. 562, it appears six actions were consolidated to recover back duties alleged to have been illegally exacted by the Collector

of the Port of New York. Questions of procedure were involved. This court said (p. 572):

> "In all cases of ambiguity the contemporaneous construction, not only of the courts but of the departments, and even the officials whose duty it is to carry the law into effect, is universally held to be controlling." (Citing cases.)

It is noteworthy to observe in this connection that Judge Adler, in the *Hurley* case, and Judge Rudkin, in the case at bar, each recognized the force and applicability of this well established rule of statutory construction; while, on the other hand, the rule utterly fails of recognition or consideration by Judge Woodward, in the Ice Box case, and by Judge Hand, in the Ten Bottles of Scotch Whiskey case. This fact should be persuasive, and if there be any doubt in ascertaining the true legislative intent, from a reading of the statute (R. S. 3453 (26 *U. S. C. A.* 1185)) we believe such doubt should be resolved in favor of respondent by an affirmance of the judgment herein.

But we earnestly contend the statute is susceptible of but one rational construction and it is that given it by Judge Adler in the Hurley case. (*In re Hurley*, 37 F. (2d) 397.) It seems to us that when the section, containing but a single sentence, was carried forward into the Revised Statutes, punctuated so as to divide it into three separate sentences, each with a separate and distinct subject matter, the punctuation was made for the definite purpose of freeing the section from the doubtful judicial constructions theretofore given it by the courts, as in *United States v. Quantity of Tobacco, Quantity of*

*Distilled Spirits*, and Cf. *United States v. Thirty-three Barrels of Spirits*, cited by counsel for the United States on pages 12 and 13 of their brief. After the effective date of the adoption of the Revised Statutes (Dec. 1, 1873), it appears the section was considered and construed in 1879 by District Judge Choate in *United States v. Sixteen Barrels of Distilled Spirits*, cited on page 14 of their brief. Thereafter a half century slipped by, and on January 8th, 1930, Judge Woodward, of the Illinois District Court, handed down the court's decision in the Ice Box case (*U. S. v. One Ice Box*, 37 F. (2d) 120), citing and following the reasoning of the early cases above referred to. Three days later, January 11, 1930, came the decision in the *Hurley* case. Among other things Judge Adler said:

> "Since 1879, so far as disclosed by reported cases, the Department of Internal Revenue of the United States has not availed itself of this statute to seize personal property other than the contraband goods, except in the case of a distillery or manufactory of some kind. The Department of Prohibition is now attempting to make seizure under this old revenue statute. The case under discussion and a number of other cases now before me are in fact ordinary violations of the National Prohibition Law (27 U. S. C. A.). That act furnishes an adequate remedy, and in the judgment of Congress adequate punishment for its violation. It is not necessary or desirable for the Prohibition Department to try to operate under an old taxing statute which, while technically in force was not intended to be used to enforce the Eighteenth Amendment to the Constitution."

*In re Hurley*, 37 F. (2d) 397.

An examination of the statute (*R. S.* 3453 (26 *U. S. C. A.*, 1185)) shows the first sentence refers only to contraband things that may be seized and forfeited under the circumstances therein named. It embraces a complete legislative declaration upon the subject, and it includes a forfeiture clause. The second sentence covers two distinct classes of things made the subjects of seizure and forfeiture, and there is one forfeiture clause at the end covering both classes. The sentence is divided into two parts, separated by a semi-colon. The first part embraces "raw materials" * * * "manufacture the same into articles". * * * "manufactured articles"; condemned, but not forfeited under this clause. The second clause embraces "tools, implements, instruments," * * * "personal property" * * * "in the place or building, within" * * * "yard" * * * "enclosure where such articles or raw materials are found, may also be seized" * * * "forfeited as aforesaid." The second sentence, resolved into its component parts, to show the relation of these several parts, by the application of the common rules of grammatical construction, discloses the words "such articles or raw materials", found in the second clause, refer to, relate back, and become associated only with the words, "raw materials", "articles", and "manufactured articles", found in the first clause. The seizure and forfeiture phrase in the second clause clearly circumscribes and limits the things subject to seizure and forfeiture to those named in the second sentence, as does the seizure and forfeiture phrase in the first sentence limit and circumscribe things condemned in the first sentence. Were it otherwise we may well assume the enactment would have included a seizure and forfeiture

clause at the end of the first clause of the second sentence to harmonize with that in the first sentence, and the second clause of the second sentence made a third and separate sentence with a coverall seizure and forfeiture clause covering tools, etc., to apply to, both the contraband things named in the first sentence and those named in the first clause of the second sentence. Or, on the other hand, a single seizure and forfeiture clause covering the whole section would have sufficed. However, we deal with the statute as we find it. The first forfeiture provided for covers things taxable; the second covers raw materials, manufactured goods subject to tax, and innocent chattels found in association therewith, obviously at a manufactory of some kind and not elsewhere.

Of course statutes must yield to grammatical construction where possible. Punctuation is often found to be a fallible test. Here, however, we find a statute deliberately punctuated in a manner obviously designed to facilitate an understanding of its language and to illuminate more fully the legislative intent in its passage. After the lapse of a half century the statute is called into prominence, not by the Treasury Department, charged with the duty of enforcing its provisions, but by National Prohibition Agents bent on enforcing the National Prohibition Act; the seizures made by them being thereafter "Adopted by the Government" (R. 3.) to bring the property seized within the court's jurisdiction. In the case at bar the property owned and claimed by respondent was already in *custodia legis*, stored in a public warehouse, when seized (?) by the Marshal. (R. 3, 7-9.) It was not then "in the place or building,

or within any yard or inclosure where such articles or raw materials" (1 gallon moonshine whiskey; 1½ gallons gin; 27 pints home brew beer) (R. 39) were found.

We respectfully submit the Circuit Court of Appeals for the Ninth Circuit did not err in holding the property libeled in this case does not come within the forfeiture provisions of *R. S.* 3453 (*26 U. S. C. A.*, 1185.)

II.

From what has been said above we do not wish to be understood as yielding to the proposition that seizures and forfeitures may be had under the Revenue Act when, as in this case, prosecution under the National Prohibition Act is commenced and is pending during the time the libel proceeding is instituted and terminated in the trial court. The record here discloses, as pointed out in the supplemental statement, such to be the facts in this case.

We take the view that this court is not necessarily concerned with the reasons prompting the judgment here under review if it is supported by the record. (4 *C. J.* 1080, Sec. 3066) even though the grounds or reasons therefor may not be sustainable. (4 *C. J.* 1132, Sec. 3125.)

Other grounds for the reversal of the judgment of the trial court were urged upon the appeal to the Circuit Court of Appeals (R. 46-49), but that court found it unnecessary to consider them and based its conclusions solely upon a construction of the Revenue Act (*R. S.* 3453 (*26 U. S. C. A.*, 1185). Thus the scope of the decision embraces all proceedings in rem under that statute, without regard to criminal prosecution under

the National Prohibition Act, under the same state of facts. Based upon this ground alone we believe the judgment is sound. Yet we urge this Court to give consideration, if it be deemed expedient, to the following assignment of error:

Assignment of Error No. II (R. 47):

"The court erred in holding and deciding the property described in the libel of information is forfeited and now condemned under the provisions of Section 1185, Title 26, U. S. Codes, for that when the seizure of the property was made, to-wit, on the 24th day of February, 1930, it was seized under a search warrant issued by L. M. Van Etten, a United States Commissioner for the District of Montana, Butte Division, to Ben Holter, a National Prohibition Agent, acting as an officer of the court, and the libelee, George Lewis, was arrested in connection with said seizure for the unlawful possession of intoxicating liquor in violation of the National Prohibition Act, and thereafter an indictment charging the said George Lewis with the unlawful sale of intoxicating liquors; the unlawful possession of intoxicating liquors, and the maintainance of a common nuisance in connection therewith at said 7 West Galena Street, Butte, Montana, in violation of Chapter 2, Title 27, U. S. Codes, based upon his arrest, as aforesaid was returned by the grand jury, and the said George Lewis was held under bail thereunder in that certain criminal action pending in the above entitled court No. 2449, entitled: 'United States of America, Plaintiff, vs. George Lewis, et al., Defendants,' and the said cause was set for trial in the above-entitled court on the 23rd day of May, 1930, and said cause being ready for trial was called for trial, and the said George

Lewis, defendant, failing to appear, his bail was forfeited and a bench-warrant issued for his apprehension, all of which appears by the records in said criminal cause received in evidence at the trial of this libel action, by reason whereof, the libelant herein elected unconditionally to proceed under the National Prohibition Act, and not under any Internal Revenue statute, particularly not under Section 1185, Title 26, U. S. Codes."

Counsel for the United States are correct in assuming that we rely upon *Commercial Credit Co. v. United States,* 276 U. S. 226, and *Richbourg Motor Co. v. United States,* 281 U. S. 528, to sustain our views. (Brief, 22.) Their conclusion is wrong, however, that we are foreclosed by the decision of this Court in *Various Items of Personal Property et al. v. United States,* 282 U. S. 577. (Brief, 23.) Wrong, because they have overlooked the facts in the case. In that case a seizure at a distillery *without a search-warrant* was involved. A libel of information was filed under sections 3257-3281, Revised Statutes, of property constituting a distillery, warehouse, denaturing plant, and their contents, on premises located within the Western District of New York. Waterloo Distillery Corporation conducted the business of distilling and denaturing alcohol under permit from the Bureau of Prohibition. The libel charged attempt to defraud the United States of tax imposed by section 600A of the *Revised Statutes* of 1918 (26 *U. S. C. A.,* Sec. 245), whereby the Government claimed the property became subject to forfeiture under sections 3257, 3258, Revised Statutes. Specific charges of unlawful withdrawals and diversions for

beverage purposes were alleged. The seizure was made by National Prohibition Enforcement officers *without any search-warrant.* In the opinion of the court below it is said (40 F. (2d) 422, 424):

> "The judgment is challenged on the theory that sections 3257 and 3281 are in direct conflict with section 25 and section 22 of title 2 of the Prohibition Act (27 U. S. C. A., sec. 3). *Section 25 relates to property seized under search-warrant and makes the property so seized subject to such disposition as the court may order. Had there been such a seizure that section might preclude forfeiture under the revenue laws.* (Italics supplied.) Cf. Commercial Credit Co. v. United States, 276 U. S. 226."

There was a prosecution and conviction under Section 600-A of the *Revenue Act of 1918*, and the National Prohibition Act was not involved.

We submit there is nothing in the opinion of this Court in the case cited to indicate a contrary view. Section 25 of the *National Prohibition Act* (27 *U.S.C.A.* 39) (Brief, Appendix, p. 29) is specific upon the point. The Commercial Credit Company case cited above was decided February 20th, 1928, and it holds that the conviction of the driver of an automobile for illegal possession of intoxicating liquor following his arrest when discovered in the act of transportation requires a disposition of the vehicle under the provisions of section 26 of the *National Prohibition Act* (27 *U. S. C. A.* 40), and precludes subsequent proceedings against it under the Revenue Act (26 *U. S. C. A.* 1181), for forfeiture for intent to defraud the Government of a revenue tax.

On the other hand, where no prosecution is had under the National Prohibition Act, a proceeding in rem under the revenue laws is proper, as in *United States v. One Ford Coupe*, 272 U. S. 321. (Brief, 21.) But, the decision of this Court in *Richbourg Motor Company v. United States*, 281 U. S. 528, settles beyond further controversy that, in transportation cases, the instrumentalities used in the conveyance of intoxicating liquors, contrary to law, may be seized and disposed of only under the provisions of the National Prohibition Act (27 *U. S. C. A.* 40), Referring to the Willis-Campbell Act, this Court declared:

> "By Section 5 of the Willis-Campbell Act of November 23, 1921, chap. 134, 42 Stat. at L. 222, 223, U. S. C. title 27, Section 3, all laws relating to the manufacture, taxation and traffic in intoxicating liquors and penalties for their violation, in force when the National Prohibition Act was adopted, were continued in force except such provisions as are 'directly in conflict with any provisions of the National Prohibition Act'."

The Court reviews and comments upon its earlier decisions involving prohibition cases, and declares:

> "In providing for forfeitures under this section, Congress was not unaware that the enactment of the National Prohibition Act would enormously increase seizures of vehicles, beyond those made under Section 3450, and that their forfeiture would place an increased and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By Section 26 it gave such protection in all cases where the prosecution of the person guilty of the transportation

is had under the National Prohibition Act. This would have been but an idle gesture and the congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized, the prosecuting officers could compel forfeiture of the interests of innocent third persons under Section 3450. Yet, that is the effect of the construction of Section 26 contended for by the government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of non-tax paid liquor. See United States v. One Ford Coupe Auto, supra (272 U. S. 326, 71 L. ed. 283, 47 A. L. R. 1025, 47 Sup. Ct. Rep. 154),"

As to transportation cases, the Court takes the position that in the enactment of the National Prohibition Act Congress used carefully chosen language:

"We think that Congress did not take the precaution to enact the carefully chosen language of Section 26 merely to impose general duties on prosecuting officers already placed on them by other sections of the act, but that its purpose was to preclude the nullification of the protection which Section 26 had extended to innocent third persons."

In view of the above, we must assume the National Prohibition Act as a whole is circumscribed with carefully chosen language, and within its confines if it is disclosed a complete and adequate remedy is afforded in cases where the charge is for unlawful possession of intoxicating liquors, unlawful sale, and the maintenance of a common nuisance in connection therewith,

then the revenue statutes may not be resorted to for the imposition of additional penalties and forfeitures, notwithstanding the Willis-Campbell Act.

In view of what we have said in this Brief, we respectfully advance the contention that when the Congress passed the Volstead Act the language of that Act was deliberate, unambiguous and complete, and provided ample remedies for its violation. As to transportation cases, we have learned that Act alone can be applied to the confiscation and condemnation of the instrumentalities used in the act of transportation, (*Richbourg Motor Company v. United States*, et al., supra), and we now advance the contention that when one is found in the possession of and is selling intoxicating liquors contrary to law, and maintaining a common nuisance, the Volstead Act (Title 27, *U. S. C. A.*) provides also a complete, harmonious and consistent remedy, wholly opposed to the Revenue laws, notwithstanding the Willis-Campbell Act.

We refer first to Section 39, which makes it unlawful to have or possess any liquor or property designed for the manufacture of liquor, or intended for use in violating the law, and which destroys property rights therein, and provides a search-warrant may issue and the liquor and containers thereof "and such property" shall be subject to such disposition as the court may make thereof, and provides further:

> "The liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order."

The Circuit Court of Appeals, Ninth Circuit, has construed this section, *In re Herter; Herter v. United*

*States*, 33 Fed. (2d) 400-402. So, if the searching officers took anything other than that prescribed by statute under their search warrant, or as authorized by the statute, it becomes apparent at once that in this case the authority therefor was lacking.

What is the remedy? Lewis was indicted for the maintenance of a common nuisance in connection with his unlawful possession and sales of intoxicating liquor contrary to the Volstead Act. He was arrested under a search-warrant, and the seizing Federal Prohibition Agents took, not only him into custody, but, exceeding the limits of their search-warrant, took the property here claimed into their possession. As pointed out in the supplemental statement of the case, Lewis defaulted and a new bond was fixed for his apprehension. Thus showing unmistakably the disposition of the government to prosecute him under the National Prohibition Act. In such cases seizures and confiscations are limited to the provisions of Section 39, Title 26, *U. S. C. A.* (*In re Herter; Herter v. United States*, supra.) The seizure was adopted by the government, and, under the law, the property, being in *custodia legis*, could be disposed of only as the court should direct, but not under any libel of information.

Where a party is found in possession of, or selling, intoxicating liquors contrary to law, a complete and adequate remedy is afforded. An injunction may be applied for at once, and if it be issued the *fixtures shall remain intact.* In such cases the court will issue a temporary injunction restraining all persons, "from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the

violation of this chapter constituting such nuisance." (Sec. 34, Title 27, *U. S. C. A.*)

In the case at bar Lewis was charged with the maintenance of a common nuisance under the National Prohibition Act. This fact is disclosed by the indictment on file against him. (R., 37.) Under these circumstances the court had a single duty to perform, and it was to abate the nuisance, as specifically provided, in concise, easily understandable language, by Section 34, Title 27, *U. S. C. A.* and Section 35 of the same title and chapter.

Certainly if the Congress had in view the fact that many innocent owners of automobiles might possibly be subjected to the penalties of forfeiture because of the unlawful transportation of intoxicating liquors in their cars, and used carefully chosen language to provide against such forfeiture and condemnation (*Richbourg Motor v. United States, et al.*, supra), it provided also an adequate remedy against possessors and sellers of intoxicating liquor by declaring the place of business, where the unlawful enterprise was being carried on, may be abated, but not destroyed, for a period of time following the alleged offense.

All the articles described in the libel are susceptible of legitimate use and it is not alleged any of them ever contained intoxicating liquor or in anywise were unlawfully used.

*In re Herter; Herter v. U. S.*, supra.

But, counsel for the United States deny the applicability of the Richbourg decision to the facts in this proceeding. It is quite apparent that, in the position

they assume, they wholly ignore the ordinary rules of statutory construction so universally known as to require no comment. Carried to its logical conclusion, their contention would result in great injustice, if not absurdity. To illustrate: A. is observed in the act of driving a truck loaded with cases of goods, wares or merchandise. He stops in an alley in the rear of a hotel where he proceeds to discharge his cargo by removing it from the truck into the rear hotel entrance. While so engaged he is followed by Prohibition Enforcement Agents who discover he is depositing the cases in a barroom having magnificent and costly bar fixtures and furnishings, evidently placed there at some time in the past when the sale of intoxicating liquors was lawful. B. is behind the bar waiting on customers. He takes a bottle from a case A. has just delivered and is in the act of serving a customer from its contents when he is arrested by the Prohibition Enforcement Agents. A. also is arrested at the same time. The bottle is found to contain contraband intoxicating liquor. Further examination discloses the entire truck load of cases contain contraband intoxicating liquor. Under these facts A. must be prosecuted, and the truck must be disposed of, under the provisions of the National Prohibition Act, upon the authority of the Richbourg case. B. would be prosecuted under the provisions of the National Prohibition Act, for unlawful sale, unlawful possession, and for maintaining a common nuisance. The nuisance would not be abated as specifically provided by the terms of the National Prohibition Act, but the bar room would be stripped bare of its valuable furnishings so there would be nothing left for the court to abate. A temporary writ of in-

junction, "* * * restraining the defendant from conducting or permitting the continuance of such nuisance, until the conclusion of the trial." (Sec. 22, Title II, *National Prohibition Act* (27 *U. S. C. A.* 34) (Brief, 28), would be an idle gesture indeed. An order, "* * * restraining the defendant and all other persons from removing or in any wise interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance" (Id.) would be a farce. Proceedings *in rem* under the Revenue Statute would take hold, and make rid of the property.

The Congress in enacting the National Prohibition Act, intended to and did write an act to enforce the provisions of the 18th Amendment to the Constitution that would enforce those provisions, and those provisions only. (*66th Congress,* 1st Sess., Vol. 58, No. 3, pp. 2891, et seq.)

It is submitted such was not the legislative intent when the Congress passed the National Prohibition Act.

The judgment should be affirmed.

Respectfully submitted,

GEORGE D. TOOLE,
C. S. WAGNER,
*Counsel for Respondent.*